Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 89-131

In The

Supreme Court of the United States

October Term, 1989

CLYDE STORIE, Individually and in his official capacity as a County Sheriff, Thurston County, Nebraska; and DANIEL WHITTED, Individually and in his official capacity as a Deputy County Sheriff,

Petitioners,

vs.

KENNETH DUNCAN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Whether the petitioners are seeking relief from a trial that has not yet occurred.

Whether the petition for a Writ of Certiorari is made for the sole purpose of delay, is frivolous, and should be denied forthwith.

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STATEMENT OF THE CASE

The petitioners submitted the question of qualified immunity on their motion for summary judgment. The Honorable Judge Warren Urbom and the 8th Circuit Court of Appeals both held the issue of qualified immunity cannot be determined upon the record made by the petitioners and that issue is still before the court. Judge Urbom and the 8th Circuit Court of Appeals both held there is a divergence of facts yet to be decided by a jury for a determination of: (1) exigent circumstances, (2) place of arrest, (3) excessive force, and (4) reasonable belief; upon which the issue of qualified immunity can be made.

The respondent's evidence is far different from the petitioners, and if believed, would establish the existence of the following facts:

This is an action to recover damages for deprivation of the Respondent's civil rights pursuant to 42 U.S.C. §§1983, 1988, that are protected by the first, fourth, fifth and fourteenth amendments to the United States Constitution. The action was filed in the United States District Court for the District of Nebraska. The Petitioners filed a motion for summary judgment claiming qualified immunity. The trial court, in its amended order of November 4, 1987, denied the motion for summary judgment; and the Petitioners are asking for a Writ of Certiorari from the ruling of the 8th Circuit Court of Appeals affirming that judgment.

On December 23, 1985, the Emerson, Nebraska, Rescue Squad was called to the residence of a Mrs. Bottger by her family. Three members of the rescue squad responded to the call. They were James Sherlock, the Fire

Chief of Emerson, Nebraska; Ken Duncan, the Police Chief of Emerson, Nebraska; and Colleen Duncan, the wife of Ken Duncan.

Upon arrival, they found that Mrs. Bottger, an elderly lady, was in the bedroom in bed; and they could not find a pulse. They immediately transported her to the hospital in Pender, and she was dead upon arrival at the hospital.

The next morning, Ken Duncan called the Sheriff's Office in Thurston County and reported to Mrs. Clyde Storie the fact that the call had been made and that a written report was available for the Sheriff upon the Sheriff's return to the county.

Three days later, on the 26th of December, Sheriff Storie returned to his office and was given the message from Police Chief Duncan regarding the rescue squad call. Sheriff Storie then immediately sent his deputy to Emerson, Nebraska, allegedly to investigate the matter, but instructed him to revoke the red light permit that was held by the Emerson Rescue Squad. Deputy Whitted went to the residence of Ken Duncan on one occasion and interrogated Mrs. Duncan regarding the incident. He informed Mrs. Duncan that he wanted to speak to Ken; and on two other occasions, he drove by the house apparently looking for Ken Duncan.

The Deputy also on two occasions appeared at the business establishment of James Sherlock, the Fire Chief. On the first occasion, in front of customers of Mr. Sherlock, he informed Mr. Sherlock that he was not happy with the way in which the rescue squad had handled the

call; and on the second occasion, he informed Mr. Sherlock that the people there were not as smart as they thought they were and that he didn't like Mr. Sherlock.

It was obvious from Deputy Whitted's behavior that his purpose in Emerson was not, in fact, to investigate the matter but was to harass and intimidate the members of the rescue squad.

When Ken Duncan returned to his residence, he was informed by his wife that the Thurston County Sheriff's office wanted to talk to him. He called and asked to speak to Sheriff Storie. In that conversation, Police Chief Duncan informed the Sheriff that he had a written report regarding the incident and could get the report to the Sheriff, and it was available for the Sheriff, and that he had previously left word with Mrs. Storie. Police Chief Duncan further stated that he was tired of the harassment, at which time Sheriff Storie interrupted and stated "Now listen, you asshole." Police Chief Duncan then said to the Sheriff: "No, you listen you fucking asshole. If this is the way it's going to be, I'll see your fucking shrimp ass in court." There was a pause, then both said good-bye to each other and hung up.

After that conversation, Sheriff Storie took his Deputy and drove 15 miles from Thurston County into Dixon County to the home of the Police Chief. At that time, both the Deputy and the Sheriff knew that they were leaving Thurston County and entering Dixon County. Sheriff Storie did not believe that Ken Duncan was going to avoid arrest, nor injure himself or anyone else. The Sheriff also knew that even if the phone call was an obscene call, it would be only a misdemeanor. While inside his

home, Police Chief Ken Duncan observed the arrival of the Sheriff and his Deputy and obtained the written report of the Rescue Squad call. He then opened his door and while still inside his home, attempted to hand the report to Sheriff Storie through the doorway. At that time, Sheriff Storie indicated he was not there for the report and told him to step outside. Duncan refused and attempted to shut the door. The Sheriff and the Deputy grabbed Ken Duncan by the arm, pulled Ken Duncan from his home, and wrestled Ken Duncan to the ground. Deputy Whitted then applied a stun gun to Ken Duncan's spine and pulled the trigger several times.[1] Both defendants placed handcuffs on Chief Duncan.

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[1] Introduced into evidence at the hearing on the issue of qualified immunity, Kenneth Duncan testified as follows in his deposition:

> A. I said, here's the report, Clyde. And he said, that's not what I'm here for. Come outside. And I said no, I'm not going to come outside. I've told you before and I'm not arguing with you about this. I'll see you in court.
>
> If that's the way you want it, I'll see you in court, and I handed the report out to him. He started to pull the door opened [sic]. And when he pulled on the door, I reached for the door, he grabbed my left hand, the Deputy grabbed my right arm, pulled me outside onto the porch and started to wrestle me to the ground.
>
> When they were wrestling me to the ground, I felt that there was probably going to be more than just an arrest or whatever here because they said as they were pulling me out, Clyde said, we're going to – I'm going arrest you for making an intimidating phone call.

(Continued on following page)

Ken Duncan was then placed in the back of the Sheriff's car and was transported across the county line to Thurston County, Nebraska. On the way to the Sheriff's Office, the Sheriff taunted Ken Duncan telling him he

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(Continued from previous page)

And I was afraid that there was going to be more than an arrest done here, and when they were rolling me down, I put my feet under the Sheriff's stomach, flipped him over the top of me. That's when he let go of my left hand and grabbed my neck.

The Deputy still had my arm behind me like this. They pushed me down on my knees on the porch, and I had my left hand for balance and my right arm was back like this.

And he had a choke hold on me and they had my left hand behind my back. At that point I was trying to put my shoulder down so that my face didn't hit the concrete and I could feel that this stun gun was being used on me.

And when I put my left hand behind my back, then my head went down and scraped on the concrete. And then they brought my right hand behind me, cuffed me and said, now you can get up and go to the car.

Q. Okay. Did you step out on the porch as he asked you to?

A. I certainly did not. And during this scuffling, that's when I told him, Clyde, you're in Dixon County. I'm in – and that's – this is all while this was going on.

Q. Did you feel when he came to the porch that he didn't have authority to arrest you in Dixon County?

A. Absolutely, but I didn't expect him to come and arrest me. I expected him to go and pick up a copy of the report as any professional police officer would have done.

would no longer have a job. Further words were exchanged on that trip. Later on, the Sheriff contacted the employers of Ken Duncan, including the Mayor, and informed them that Chief Duncan had been arrested and was acting irrationally. This was an attempt to have Chief Duncan fired. Duncan was suspended immediately after the telephone call from Sheriff Storie.

Ken received bruises and abrasions from the incident and continued to have difficulties, physically and emotionally, following the incident, including repeated nightmares about the incident. The charges of making an obscene phone call were dismissed by the County Attorney.

SUMMARY OF ARGUMENT

1. The Petitioners are asking for relief from a trial that has not yet been held on qualified immunity.

2. The Petitioners are asking this court to accept their version of disputed facts.

3. There is no legal basis for granting the Writ, and the petition for this Writ is frivolous, expensive, and time consuming.

ARGUMENT

Reasons for Denying the Writ

I. THE PETITIONERS ARE SEEKING RELIEF FROM A TRIAL THAT HAS NOT BEEN HELD.

In *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) and *Anderson v. Creighton,* 107 Sup. Ct. 3034 (1987), the court established the rule that government officials are entitled to qualified immunity from suit insofar as their conduct does not violate clearly established statutes or constitutional rights of which a reasonable person would have known. In application of this rule, the court in *Mitchell v. Forsyth,* 475 U.S. 511 (1985), held that a denial of a motion for summary judgment regarding qualified immunity *"to the extent it turned on a question of law"* is an appealable final decision, stating such entitlement is an *"immunity from suit"* rather than a mere defense. The rationale is that an officer who has not violated clearly established constitutional rights should not have to go through a full trial.

The District Court and the Appeals Court in the case at hand has found the sworn statements of the respondent's witnesses were such that if believed, would constitute a clear violation of constitutional rights. That the petitioners' version is different and before the issue of qualified immunity can be made, the jury will have to determine the facts. The court's application of "clearly established" law would depend upon what facts the jury determined as being true. As stated on the last paragraph of the District Court opinion:

> The jury must first decide whether Duncan voluntarily stepped onto the porch and the arrest was made thereafter, or whether the defendants opened the door to Duncan's house and forced Duncan onto

> the porch so that they could make the arrest. Only after such a finding is made will the court be in a position to rule on the issue of the defendant's qualified immunity defense.

The Court of Appeals stated that there was a dispute as to material facts and that under Duncan's version:

> It would be impossible to hold as a matter of law that he voluntarily placed himself in a public place and willingly relinquished the expectation of privacy that he is entitled to when he is within his home. Duncan's version of the arrest asserts violations of clearly established constitutional rights and it would be improper to grant summary judgment before the finder of fact has determined these issues.

It is respectfully submitted that the petitioners' petition for the Writ has no merit and is made for the purpose of delay, and should be denied forthwith, on the above basis.

II. IT WAS A WARRANTLESS HOME ARREST WITHOUT EXIGENT CIRCUMSTANCES.

The respondent was arrested at his home on December 26, 1985. Five years prior thereto, it was clearly established that a warrantless home arrest, absent exigent circumstances, was a clear violation of a citizen's right against unreasonable search and seizure, protected by the fourth amendment, *Payton v. New York,* 445 U.S. 573 (1980), *State of Nebraska v. Schlothauer,* 206 Neb. 670, 294 N.W.2d 382 (1980). Exigent circumstances are determined by: (1) seriousness of the alleged offense; (2) reasonable belief that the suspect is armed; (3) clear showing of probable cause to believe that the suspect committed the

alleged offense; (4) strong reason to believe that the suspect is on the premises; (5) likelihood that the suspect will escape if not swiftly apprehended; and (6) entry may be made peaceably.

The petititoners are asking this court to rule as a matter of law that the Sheriff and his Deputy can travel to another county and harass the residents of that county, request them to contact the Sheriff's office, initiate vulgar – but not obscene – language in that phone call, and then again travel across the county lines and forceably pull a citizen from his home, wrestle him to the ground, twist his arm, stungun him, telephone his employers in an attempt to have him fired, and then claim all of this has been done in good faith and they should be immune from their actions because any reasonable officer would think he could do the same thing. That argument is frightening.

III. THERE IS NO SPLIT OF AUTHORITY ON DOORWAY ARREST

The petitioners also attempt to show there is a split of authority on whether, as a matter of law, an officer without a warrant can lawfully arrest a citizen who is standing inside the doorway to his home, on the officer's probable belief (and this is questioned) that a misdemeanor has been committed. There is no such split of authority, nor should there be. In the three cases cited by the petitioners where a warrantless home arrest was declared lawful, the gravity of the offense was much greater and exigent circumstances existed (in each case it was a felony). *U.S. v. Santana*, 427 U.S. 38 (1976), involved a felony narcotics case. Officers were in hot pursuit with

realistic expectations that evidence would be destroyed. *U.S. v. Whitten*, 706 F.2d 1000 (9th Cir. 1983), involved a felony drug charge with a finding of exigent circumstances of danger, flight, and destruction of evidence. *U.S. v. Davis*, 785 F.2d 610 (8th Cir. 1986), involved rape, the court finding a showing of exigent circumstances existed.

In the three doorway cases cited by the Petitioners where the arrest was declared illegal, like the case at hand, there were no exigent circumstances. In *U.S. v. Morgan*, 743 F.2d 1158 (6th Cir. 1984), officers received complaint about five or six people shooting guns in a park. Officers followed defendant to his home, but waited for two hours before making a doorway arrest. Held, no exigent circumstances and arrest illegal. In *U.S. v. Houle*, 603 F.2d 1297 (8th Cir. 1979), after complaint of willful use of a dangerous weapon to commit an assault, officer waited until the next day to make an arrest in the suspect's bedroom - not doorway; no exigent circumstances existed. In *U.S. v. Johnson*, 626 F.2d 753 (9th Cir. 1980), obstructing correspondence by helping forge an endorsement on a check, and no exigent circumstances existed.

The issue as to whether Duncan was in the privacy of his home vs. a public place is yet to be determined from the facts. The petitioner is asking the court to rule as a matter of law that a citizen standing inside the doorway of his home can be arrested without a warrant on *the police officer's claim* he had reasonable cause to believe a minor misdemeanor offense had been committed. This has *never* been the law.

Rule 17 of the Court provides that a review on Writ of Certiorari is not a matter of right, but will be granted only when there are special and important reasons therefor. The petitioners have attempted to show a split of authority exists on the law involving factual issues in this case. No such split exists and the petition should be denied forthwith.

CONCLUSION

There is no legal basis for granting the Petition. The Petition is frivolous, expensive, and time consuming and should be denied forthwith.

Respectfully submitted,

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